> Except as provided in subdivision (c), the assignee of any general assignment for the benefit of creditors (as defined in Section 493.010) may recover any transfer of property of the assignor:
>
> (1) To or for the benefit of a creditor;
>
> (2) For or on account of an antecedent debt owed by the assignor before the transfer was made;
>
> (3) Made while the assignor was insolvent;
>
> (4) Made on or within 90 days before the date of the making of the assignment or made between 90 days and one year before the date of making the assignment if the creditor, at the time of the transfer, was an insider and had reasonable cause to believe the debtor was insolvent at the time of the transfer; and
>
> (5) That enables the creditor to receive more than another creditor of the same class.

California Code of Civil Procedure, Section 1800(b) (1999).

Because the language of the Wisconsin, Texas, Ohio and California statutes are parallel, and because this Court has upheld the three former statutes, logic alone dictates Section 1800 also is valid and not pre-empted.

B. The Ninth Circuit's Decision Both Ignores And Misreads This Court's Decisions Upholding Other State Insolvency Statutes

The majority opinion cites *Pobreslo v. Joseph M. Boyd Co.* but does not mention that this Court *upheld* the Wisconsin statute before it. Instead, the majority opinion

cites *Pobreslo* only for its language that the Wisconsin statute "merely provided the procedure" by which the common law of assignments for benefit of creditors was to be carried out in that state, *Sherwood*, 394 F.3d at 1206 n.8, and for the commonplace proposition that a state statute which purports to give an insolvent debtor a discharge from his liabilities is unconstitutional in light of the Bankruptcy Code.[2] *Id.* at 1203.

If, according to the majority opinion, a state statute that merely embodies the procedures by which the common law of assignments for the benefit of creditors is carried out is not pre-empted by the Bankruptcy Code, *Sherwood*, 394 F.3d at 1206, n.8, then Section 1800 plainly meets that standard. California has long had common law concerning assignments for the benefit of creditors. *See*, *Brainard v. Fitzgerald*, 3 Cal. 2d 157, 163, 44 P.2d 336, 339 (1935); Report of the California Senate Judiciary Committee, Senate Bill 219, March 23, 1999 ("California law recognizes the common law procedure known as 'Assignment for the Benefit of Creditors . . . '"). The California common law was codified as California Civil Code Section 493.020 in 1977, providing for the making of an assignment for the benefit of creditors. Indeed, the California legislature declared: "It is the intent of the Legislature that Section 493.020 of the Code of Civil Procedure, as added by Section 1 of this act, is declaratory of existing law." California Statutes, 1977, chapter 499, section 2.

In the following legislative session, the California legislature enacted Section 1800 to provide the procedures

[2] No section of the California statute purports to "discharge" a debtor from his or her liabilities.

by which an assignment under Section 493.020 would be managed. This is exactly what this Court approved in *Pobreslo*. Yet, the majority opinion ignored the exact parallel between the Wisconsin statutes this Court approved in *Pobreslo* and the California statute it condemned in this case. This Court should grant a writ of *certiorari* to either disapprove its prior decision in *Pobreslo* or reverse the Ninth Circuit's decision in this case – these two cases cannot coexist in the same legal universe.

The majority opinion does not even cite *Johnson v. Star*, decided at the same time as *Pobreslo* and *upholding* a similar Texas insolvency statute. However, *Johnson* demonstrates that the panel majority's attempt to distinguish *Pobreslo* as merely providing the procedure for implementation of the state's common law is not a valid basis for distinction. As this Court observed, the Texas statute at issue in *Johnson* was evidently intended to fill the gap left by the 1878 repeal of the federal Bankruptcy Act of 1867. 287 U.S. at 528. Nothing about the statute suggested it merely declared existing Texas common law. Rather this Court said: "It [the Texas statute] established a complete system for the administration of property conveyed by insolvent debtors for the benefit of their creditors." *Id.* at 528 (citing *Tracy v. Tuffly*, 134 U.S. 206, 223 (1890)). Thus, the Texas statute was not merely procedural; it created substantive rights – rights this Court ruled were consistent with and *not* pre-empted by the then re-enacted federal Bankruptcy Act. It is impossible to reconcile *Johnson* and the Ninth Circuit's decision here ruling California's Section 1800 is pre-empted.

Finally, while the majority opinion discusses *Stellwagen v. Clum* – and even acknowledges this Court (once again) *upheld* the state statute at issue allowing assignees

to void certain preferential transfers – its explanation as to why *Stellwagen* does not also apply here fails to withstand analysis.

The majority opinion states the Ohio statute at issue in *Stellwagen* gave assignees only those powers also available to any creditor. *Sherwood*, 394 F.3d at 1205-1206. Why that distinction, even if true (which it is not, as shown in the following section), should make a difference is not cogently explained. The majority opinion does not cite a single case in which that distinction tipped the balance between a valid and an unconstitutional statute. Nor does the majority opinion provide any policy reason why that should be so.

At its heart, the Ninth Circuit's explanation rests on this single sentence: "Congress has thought carefully about how collective insolvency proceedings are to be conducted and set both substantive standards and elaborate procedural protections to ensure a result that is fair to debtors and creditors alike." *Id.* at 1205-1206. However, the majority opinion fails to point to any provision of the present Bankruptcy Code or its legislative history that so much as suggests Congress' "careful consideration of collective insolvency proceedings" contains any indication state preference recovery statutes are inconsistent with the Bankruptcy Code.[3] In the absence of any evidence of

[3] The majority opinion instead focuses on federal bankruptcy procedural protections, such as Bankruptcy Court supervision and appointment of trustees by an agency of the Department of Justice. *Sherwood*, 394 F.3d at 1204. But this is not any basis to find substantive pre-emption. Not one of the three state statutes this Court has *upheld* provided for supervision by the federal courts or the Department of Justice either. There is no basis in the record, or in any legal authority, for the majority's apparent belief that only "federal" supervision is good enough for insolvency matters.

Congress' intent to preempt preference recovery by assignees unless, historically, all creditors could take the same action, the Ninth Circuit's reasoning would mean the enactment of the Bankruptcy Code preempts all state law "collective insolvency proceedings." But we know that not to be the case.

Moreover, at the time the Wisconsin, Texas and Ohio statutes were examined by this Court, Congress had already enacted a bankruptcy law. That law also provided for the recovery of preferential transfers. Bankruptcy Act of 1898, Sections 60a and 60b.[4] Thus, the federal bankruptcy law examined in *Pobreslo*, *Johnson* and *Stellwagen* had a comprehensive preference recovery system. So did the Wisconsin, Texas and Ohio statutes. *Pobreslo*, *Johnson* and *Stellwagen* therefore make clear that congressional thought "about how collective insolvency proceedings are to be conducted" (including providing for recovery of preferences) is *not* incompatible or inconsistent with state law insolvency proceedings that include preference recovery systems. And since Section 1800 is analogous in nature and effect to the Wisconsin, Texas and Ohio statutes, so too, it is *not* incompatible or inconsistent with "congressional thought" on insolvency proceedings.

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[4] 30 Stat. 544, Sections 60a and 60b respectively. Later amendments made those sections very similar to the present Title 11, U.S.C. Section 547. For a detailed discussion of the state of the preference law during the relevant time frame, see Countryman, "The Concept of a Voidable Preference in Bankruptcy," 38 Vanderbilt Law Rev. 713, 719, *et seq.* (1985).

C. The Ninth Circuit Is Simply Wrong In Its Reading Of The State Insolvency Statute At Issue In *Stellwagen* – There Is No Substantive Difference Between That Statute, Which This Court *Upheld*, And California's Section 1800

The Ninth Circuit also distinguished the Ohio statute at issue in *Stellwagen* from California's Section 1800 on the ground the Ohio law gave the assignee no greater powers than were available to individual creditors. This is simply wrong. The Ohio law at issue in *Stellwagen* – which this Court *upheld* – is substantively exactly the same as California's Section 1800.

Ohio common law allowed individual creditors of an insolvent to recover preferential transfers by direct legal action. The Ohio statute at issue granted an assignee for benefit of creditors exactly the same powers in a collective proceeding.

Section 1800 provides for the same result; it simply follows a different way of getting there. Under Section 1800 an assignee is empowered to recover preferential transfers. The statute does not directly empower individual creditors to sue to recover preferential transfers for the benefit of all, but California common law grants individual creditors the right to enforce Section 1800 by filing their own suit. Individual creditors therefore possess all of the rights granted to the assignee for benefit of creditors, should the assignee fail to pursue a preference recovery action.

It is well established under California law that an assignee for the benefit of creditors is a trustee for the benefit of the assignor's creditors, not just a custodian for

the assignor. *E.g., Brainard*, 3 Cal. 2d. at 163, 44 P.2d at 339; *Mechanics Bank of Richmond v. Rosenberg*, 201 Cal. App. 2d 419, 424, 20 Cal. Rptr. 202 (1962). Likewise, under California law, where a trustee of a trust cannot or will not enforce a valid cause of action that the trustee ought to bring against a third person, a beneficiary of the trust may seek judicial compulsion against the trustee by suing directly and joining the trustee and the liable third party as defendants. *E.g., Saks v. Damon Raike & Company*, 7 Cal. App. 4th 419, 426-430, 8 Cal. Rptr. 2d 869, 873-7 (1992).[5]

Because an assignee for the benefit of creditors is a trustee, the failure of the assignee to pursue a preference claim under Section 1800 activates the potential right of a creditor, as a beneficiary of the assignment trust, to

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[5] For example, in *Saks*, the plaintiff, the beneficiary of a testamentary trust, sued both the trustee and a third party, alleging the beneficiary brought "this action for the benefit of all beneficiaries of the trust, including themselves; for the benefit of the subject trust; and on behalf of the current trustee of the subject trust which has failed and refused to bring this action despite demand having been made upon it to do so by plaintiffs." The *Saks* Court held "where a trustee cannot or will not enforce a valid cause of action that the trustee ought to bring against a third person, a trust beneficiary may seek judicial compulsion against the trustee in order to prevent loss of or prejudice to a claim the beneficiary may bring an action in equity joining the third person and the trustee." 7 Cal. App. 4th at 427-8, 8 Cal. Rptr. 2d at 873. Because the trust in the *Saks* case was a testamentary trust, the *Saks* Court held the beneficiary was required to sue in probate court. Nevertheless, the case reaffirms that it is perfectly appropriate for a beneficiary whose trustee fails or refuses to properly pursue a cause of action that belongs to the trust estate, to sue the third party directly, joining the reluctant trustee as a party defendant. *See also Triplett v. Williams*, 269 Cal. App. 2d 135, 137-138, 74 Cal. Rptr. 594, 595-7 (1969); *Women's Athletic Club v. Anglo California National Bank*, 90 Cal. App. 2d 850, 852, 204 P.2d 411, 412 (1949); *Restatement (2d) of Trusts*, § 282.

initiate such action, joining the assignee as a party defendant. Any recovery, of course, would inure to the benefit of all creditors because, as in the case of the Ohio statutes upheld in *Stellwagen*, the recovery is through the assignment estate. 245 U.S. at 619.

In short, California's common law and Section 1800, together, provide for the same result as the Ohio statutes that this Court held in *Stellwagen* were *not* pre-empted. The only difference is that California law supplies the beneficiary's right to sue through non-codified legal principle. But this is a difference without consequence because California draws no distinction between its statutory and common law – both are authoritative sources of the State's law. California Civil Code Section 22.2.

The state statutes this Court approved in *Pobreslo* and *Johnson* were similar, in enacting a statutory (as opposed to a common law) right for creditors to pursue preference recoveries on their own. In *Pobreslo*, the Wisconsin statute provided that a creditor could bring an action if the assignee neglected to do so within 60 days of the assignment. *See* Wis. Stat. §§ 128.02, 128.03 (1929). In *Johnson*, the Texas statute specifically provided that any creditor could bring an action in the name of the assignee if the assignee neglected or refused to do so. *See* Tex. Rev. Civ. Stat. Title 12, Vernon's Annotated Civil Statutes, Article 268. Neither statute granted a right to an individual creditor to sue to recover a preference outside the assignment for benefit of creditors context. That is exactly parallel with Section 1800.

Thus, under the California approach, the power to recover preferential transfers is granted to an assignee and, under recognized state common law, those powers are

made available to individual creditors. Under the Ohio approach in *Stellwagen*, the powers to recover preferential transfers were granted to individual creditors, and the statute in question passed those powers on to an assignee. In both cases the assignees and individual creditors both have the right to sue for preferential transfers. Accordingly, the Ninth Circuit's attempt to distinguish *Stellwagen* on the basis of individual versus collective action is simply wrong.

II. CALIFORNIA'S SECTION 1800 DOES NOT INTERFERE WITH FEDERAL BANKRUPTCY OBJECTIVES

The Ninth Circuit acknowledges that the foremost test of whether a state insolvency law is pre-empted is whether it purports to grant the debtor a discharge from its debts. *Sherwood*, 394 F.3d at 1203. Section 1800 does not even hint that an assignor acting under this section could procure a discharge for the debtor. Nor did the Circuit Court conclude Section 1800 suffered from this affliction.

Instead, the Ninth Circuit suggested several other supposed policy reasons why Section 1800 is pre-empted, none of which stand up under examination.

First, the majority opinion suggests Section 1800 chills the likelihood of involuntary bankruptcies, thereby injuring less diligent creditors. *Sherwood*, 394 F.3d at 1204-5. Not so. The only reason why a creditor might not join other creditors in an involuntary bankruptcy petition where an assignment for benefit of creditors has been made, is because the creditor has decided that the assignment process is at least as good for it as the possible bankruptcy. There is no reason to second-guess the creditor's choice of

an assignment over a bankruptcy. The assignment process carries no greater or different risks for creditors than the many other alternatives. Unless the Court believes that Congress intended to eliminate non-bankruptcy methods of resolving insolvent debtors' liquidations, no special prohibition on assignments is justified.[6]

Second, the majority opinion suggests recovery by an assignee from a preference transferee will make it impossible for a bankruptcy trustee to also recover from the same transferee, thereby diminishing the bankruptcy estate. *Sherwood*, 394 F.3d at 1204. Not so. If an assignee's recovery from a preference transferee precludes recovery by a bankruptcy trustee, the *creditors* are not affected by that fact – and it is the *creditors* that count, not the bankruptcy trustee. An assignee that recovers a preference does not throw the recovery away. He or she distributes it to the creditors. If a bankruptcy trustee recovers a preference, he or she distributes it to the creditors. Whoever recovers the preference, it is distributed to creditors. Creditors simply are not injured by the possibility of two fiduciaries seeking preference recoveries, even if one fiduciary recovers some preferences and another fiduciary

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[6] Quite to the contrary, Congress' view seems clear that bankruptcy should be employed to resolve insolvency problems only where it is truly necessary. *See, e.g.*, Remarks of Representative. Dennis Moore of Kansas concerning the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: "Bankruptcy filings have increased by 70 percent over the last decade, and last year alone Americans filed over 1.6 million consumer bankruptcy petitions. S. 256 will not eliminate bankruptcy filings in our country, but it is a necessary effort to change the status quo and ensure that only those debtors who most need the bankruptcy system will be able to use it." 151 Cong. Rec. E704 (daily ed., Apr. 14, 2005). Eliminating a state law alternative to bankruptcy does not help to keep people out of bankruptcy court.

recovers other preferences. The total of recoveries available to be distributed to creditors is the same.

Third, the majority opinion suggests Section 1800 paves the way for the inequitable treatment of creditors and posits a "parade of horribles" through which it might be possible for an assignment for the benefit of creditors to result in inequitable treatment of creditors. *Sherwood*, 394 F.3d at 1204-6. But the opinion does not point to a shred of evidence that this statute has ever lead to such a result. If such unsupported theorizing leads to a pre-emption conclusion, then the state statutes in *Pobreslo*, *Johnson* and *Stellwagen* would all be pre-empted, as well. Most, if not all, of the supposed "parade of horribles" would occur as easily under those statutes as under Section 1800.

Furthermore, the Ninth Circuit's reasoning would dictate the pre-emption of other long-established state laws. For example, the Uniform Fraudulent Transfer Act, adopted in most states, allows a single creditor to pursue a fraudulent transfer committed by its debtor and to keep the recovery for itself. That can easily result in inequitable distribution of a debtor's assets among its creditors, but no court has ever suggested the UFTA is pre-empted by the Bankruptcy Code. Similarly, does the bankruptcy goal of equitable distribution override the priorities given certain creditors under state judgment enforcement laws? To pass muster, must a state law exactly parallel the priorities in distribution under the Bankruptcy Code, or may a state, for example, put child support obligations in front of employee wages? The Ninth Circuit's position suggests that state laws making those choices are pre-empted. But that, of course, is far beyond the recognized bounds of federal pre-emption.

CONCLUSION

Seventy years ago this Court spelled out the basic ground rules for the relationship between federal bankruptcy law and state insolvency laws. When Congress enacted the latest version of the Bankruptcy Code, it gave no indication it intended to displace these state laws – *upheld* by this Court and which have been operative for decades. The Ninth Circuit's pre-emption decision is unprecedented; it conflicts with the prior decisions of this Court and it puts in question the insolvency laws of no less than fifteen states. *Amici* urge the Court to grant Sherwood's petition for writ of *certiorari*.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 18 2005
OFFICE OF THE CLERK

No. 04-1607

IN THE

Supreme Court of the United States

SHERWOOD PARTNERS, INC., ~~Assignee~~ for the Benefit of Creditors of International Thinklink Corporation,

Petitioner,

v.

LYCOS, INC., a Delaware Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

The Ninth Circuit majority based its decision in this case on its incorrect determination that state insolvency laws that implicate equitable distribution of a debtor's assets are preempted by the federal Bankruptcy Code. Attempting to minimize the importance of this matter, the Brief in Opposition (the "Opposition") to the pending Petition for a Writ of Certiorari (the "Petition") mischaracterizes the majority opinion of the Ninth Circuit as a decision that does not apply generally to assignments for the benefit of creditors. Further, the Opposition fails to address the Ninth Circuit's departure from this Court's longstanding precedent that state assignment statutes providing for the equitable distribution of a debtor's assets are in "harmony" with federal bankruptcy law. Such statutes exist in approximately half of the states. Moreover, the Opposition ignores the Ninth Circuit's failure to apply the "strong presumption" against preemption of state laws required by this Court. Accordingly, the Ninth Circuit majority's decision is in direct conflict with this Court's governing precedent regarding (1) state law assignments as a valid means to promote equitable distribution to creditors, and (2) the requirement for federal preemption of state law. Neither of these flaws is addressed in the Opposition.

REPLY TO OPPOSITION

I. THE OPPOSITION MISCHARACTERIZES THE SCOPE OF THE NINTH CIRCUIT'S DECISION

A. The Opposition Ignores that the Basis for the Ninth Circuit's Decision Applies to Assignments for the Benefit of Creditors in General and is not Narrowly Limited to Anti-Preference Statutes

The Ninth Circuit's decision applies equally to all assignments for the benefit of creditors, not just those of California, and not just those assignment laws relating to preference actions. Indeed, as pointed out by Judge Nelson in her dissent, the Ninth Circuit's decision "would preempt any number of state laws governing voluntary assignments for the benefit of creditors. . . ." *Sherwood Partners, Inc., Assignee for the Benefit of Creditors of International Thinklink Corporation v. Lycos, Inc.*, 394 F.3d 1198, 1206 (9th Cir. 2005). (Pet. App. 17a). The Ninth Circuit strikes down California's anti-preference law because it furthers the goal of promoting equality of distribution to creditors. However, by definition, voluntary assignments are collective proceedings designed to achieve equitable distribution. As the dissent points out and the Opposition fails to address, "[t]he majority's concerns about section 1800 are not distinguishable from concerns about voluntary assignment provisions generally." *Sherwood*, 394 F.3d at 1206. (Pet. App. 19a).

The Opposition, like the Ninth Circuit majority, does not disguise its disdain for state voluntary assignment laws. Through several of its pages, the Opposition takes issue with an assignee's potential conflicts of interest, professional fees, administrative fees, incentives available to creditors for relief under state and federal law, and judicial supervision of an assignee's and its

professional's decisions. According to the Opposition, the federal system just runs better than the state law alternative. Indeed, a significant portion of the Opposition is dedicated to the thrashing of state voluntary assignment laws as opposed to argument concerning the real issues presented by the Petition. However, a bias favoring federal bankruptcy law over state law alternatives does not provide a valid basis for the preemption of state laws. Moreover, in revealing its disdain for state law, the Opposition makes the case that the scope of the Ninth Circuit ruling broadly applies to all voluntary assignment laws. Furthermore, the Opposition's statement that federal bankruptcy law has essentially replaced state voluntary assignment laws is pure fiction.[1] That assignment laws remain in effect in many states demonstrates their usefulness as valid alternatives to federal bankruptcy proceedings.[2]

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1. The Opposition's argument that there are less reported decisions for state assignment proceedings as opposed to federal preference proceedings is smoke and mirrors and as much a reflection on the limited reporting of state appellate law compared to the expansive reporting of bankruptcy court decisions, which are published at all levels of the bankruptcy process including, among others, bankruptcy court, district court, and bankruptcy appellate panel levels.

2. The Opposition offers an illustration as to the fees involved in a federal bankruptcy proceeding versus an assignment for the benefit of creditors. Aside from complete speculation, the analysis offers no facts involving the present matter and is completely irrelevant to the case at bar. Moreover, and also as irrelevant, the Opposition states that there is no stigma to assignments because the assignment estate ceases to exist after it is liquidated. This further evidences a lack of understanding of the assignment process where the assets of many assignment estates are sold as going concerns and the business of the assignor continues to operate under new ownership.

Similarly, the Ninth Circuit's discussion of the "procedural and substantive protections" offered by the federal bankruptcy system offers no insight into whether state statutes implicating equitable distribution are preempted by federal bankruptcy law. The Opposition's support of the Ninth Circuit's discussion of federal supervision of anti-preference actions could just as easily be applied to all the duties, rights and powers of an assignee.

B. The Opposition Ignores this Court's Longstanding Precedent Upholding Assignments for the Benefit of Creditors that, by Definition, Seek the Equitable Distribution of an Insolvent Debtor's Assets

This Court, in *Pobreslo,* upheld Wisconsin's assignment statute, requiring the equitable distribution of a debtor's assets, stating that the state law was ". . . in harmony with the purposes of the federal [bankruptcy] act . . . , served to protect creditors against each other and goes to assure equality of distribution." *Pobreslo v. Joseph M. Boyd Co.*, 287 U.S. 518, 526 (1933). In direct conflict with this Court's governing precedent, the Ninth Circuit in the instant case held that, like state discharge laws, "state statutes that implicate the federal bankruptcy law's other major goal, namely equitable distribution," are preempted. *See Sherwood*, 394 F.3d at 1203. (Pet. App. 9a). The Ninth Circuit majority reasoned that because the federal bankruptcy law preempts state statutes that discharge the debtor in furtherance of the bankruptcy fresh start goal, the state laws that avoid preferential transfers are also preempted because these laws further equitable distribution. *See Sherwood*, 394 F.3d at 1203-05. (Pet. App. 7a to 10a).

The Opposition makes no effort to explain how the Ninth Circuit majority's preference for federal bankruptcy proceedings over state law assignment provisions that are designed to promote equitable distribution of an insolvent debtor's assets is not in direct conflict with this Court's governing precedent. Instead, the Opposition dismissingly suggests that the issues involved in *Pobreslo*, and this Court's decision in *Johnson v. Star*, 287 U.S. 527 (1933), are not present here.[3] The Opposition simply misstates the law. As is the case here, both of those cases involved state statutes governing the equitable distribution of a debtor's assets through an assignment process.

The Opposition further asserts that the Ohio statute at issue in *Stellwagen v. Clum*, 287 U.S. 605 (1918), where this Court upheld a state law assignment anti-preference statute, is distinguishable because the Ohio statute purportedly only gave assignees those powers also available to any creditor. Why that distinction, even if correct (which it is not, as discussed in the Petition), should make a difference is not explained. Neither the majority opinion nor the Opposition cite any authority nor provide any policy reason why that should be the case.

Like the Wisconsin statute at issue in *Pobreslo*, California's statute is in harmony with the purposes of federal bankruptcy laws and serves to assure an equitable distribution of assets. As stated by Judge Nelson in her dissent, "the nature of the regulated activity – distribution of the debtor's assets [and

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3. This Court upheld yet another state law in *Johnson v. Star*, which involved a preemptory challenge to the Texas voluntary assignment statute that also contained an anti-preference provision. *See Johnson v. Star*, 287 U.S. 527 (1933). This Court held that the statute was not "repugnant" to the Bankruptcy Act and that "this case is ruled by our decision in *Pobreslo*. . . ." *Star*, 287 U.S. at 530.

furthering the goal of equitable distribution]" – is not one rendering it impossible to conclude that the state and federal systems can peaceably coexist. *See Sherwood*, 394 F.3d at 1208. (Pet. App. 21a). That has been the governing precedent for more than seventy years and the Opposition offers no compelling reason for this Court to change course now.

II. THE OPPOSITION AVOIDS DISCUSSING THE NINTH CIRCUIT'S FAILURE TO APPLY THE STRONG PRESUMPTION AGAINST PREEMPTION OF STATE LAW REQUIRED BY THIS COURT

Notably missing from the Opposition is any discussion of the preemption doctrine, which is the foundation of the Ninth Circuit's decision. This Court requires a "clear and manifest" intention of Congress to preempt state law. *See Bates v. Dow Agrosciences, LLC*, 125 S. Ct. 1788, 161 L. Ed. 2d 687, 706, 73 U.S.L.W. 4311 (2005). A federal law will preempt state law only if the federal law is so pervasive as to make reasonable the inference that Congress left *no room* for states to supplement it. *See also Florida Lime & Avocado Growers, Inc. v. Paul ("Florida Growers")*, 373 U.S. 132, 160, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963).

> Because States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state law cause of action. In all preemption cases, and particularly in those in which Congress has "legislated . . . in a field which States have traditionally occupied" . . . States were not to be superceded by the Federal Act absent the clear and manifest purpose of Congress.

See Medtronic Inc. v. Lohr, 580 U.S. 470 (1998). "The presumption against displacing state law by federal bankruptcy law is just as strong in bankruptcy as in other areas of federal legislative power." *See PG&E Company, et al., v. People of the State of California*, 350 F.3d 932, 943 (9th Cir. 2003).

The determinative factor is whether California's anti-preference law may peaceably coexist with federal bankruptcy by not standing as an "obstacle" to the accomplishment and execution of the full purposes and objectives of Congress. *See Florida Growers*, 373 U.S. at 160. It is in this landscape that the Ninth Circuit's decision strays. In applying the federal preemption test enunciated in *Florida Growers*, it is evident that California's anti-preference statute is not an "obstacle" to federal bankruptcy law. Further, there is not even an indication of any congressional design to preempt state laws authorizing an assignee to avoid preferential transfers under voluntary assignment laws.

California's anti-preference provision was intended to align state law and federal bankruptcy law and "is, by design, virtually identical to the Bankruptcy Code's preferential transfer statute." *See Sherwood*, 394 F.3d at 1207; *see also Angeles Electric Co. v. Superior Court*, 27 Cal. App. 4th 426, 430-31, 32 Cal. Rptr. 2d 660 (1994) (discussing intentional conformance of section 1800 with federal bankruptcy law). (Pet. App. 19a). "That California's voluntary assignment system has such a provision [Cal. Civ. Proc. Code § 1800] makes it more capable of effecting the equality of distribution that is the aim of bankruptcy law; it does not necessarily interfere with bankruptcy's goal of achieving equal distribution." *See Sherwood*, 394 F.3d at 1207-08. (Pet. App. 20a). In the present case, there is no impediment to federal bankruptcy law and there is simply no

reason that the federal law and California's anti-preference statute may not "peaceably co-exist" as they have done so for almost 30 years. The Petition should be granted and the Ninth Circuit's decision should be reviewed and reversed by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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